

# Submission for PhD in Law by Publication

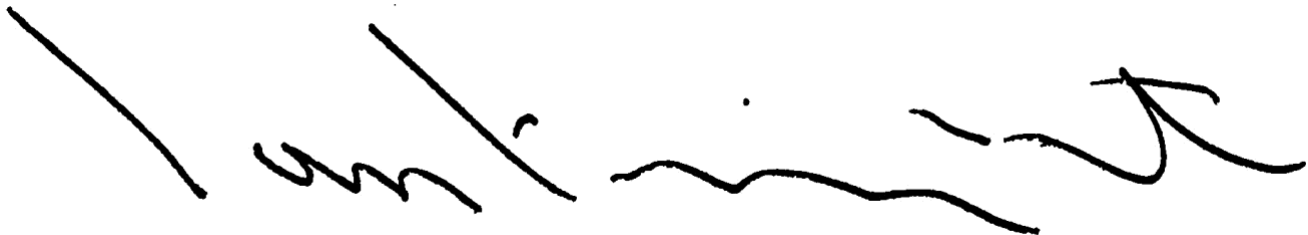
## Themes in Insurance Law

Submitted by Walter Ian Brooke Enright to the University of Exeter as a thesis  
for the degree of Doctor of Philosophy by Publication in Law, July 2017

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**University of Exeter**

**WIB Enright**  
26 June 2017

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## Submission for PhD in Law by Publication

### Introduction

1. I write this submission to describe the work in publications and to set out the works' themes, relevance and influence in support of consideration of those works for the award of the degree of a Doctor of Philosophy in Law by the University of Exeter.
2. I attach my career details in annexure A. An outline of the relevant themes in *Sutton on Insurance Law (Sutton)* is in annexure B. Annexure C contains information about the originality and influence of the work, including Sutton citations – cases, articles and submissions.
3. The selected publications are set out below.

### Selected Work – October 2012 to date

- General Insurance Code of Practice Independent Review 2102-2103, Issues Paper, October 2012 (*Code Issues Paper*)
- General Insurance Code of Practice Independent Review, Final Report, May 2013 (*Code Review Report*) The *Code Issues Paper* and the *Code Review Report* are together the *Code Review*
- *Insurance Discrimination Law in Australia – Disability*, with Lachlan Gell, submitted for publication through AIDA (*AIDA Discrimination Paper*)
- *Principles for Self-Regulation*, submitted for publication through AIDA (*AIDA Self Regulation Paper*)
- *Sutton on Insurance Law*, 4<sup>th</sup> Edition, with Professor Robert Merkin QC, December 2015 (*Sutton*)
- Geoff Masel Lecturer in 2015: “The Insurance Social Contract: 1788 and all that” [video] (*Masel Lecture*)
- Financial Ombudsman Service Life Insurance Disputes Manual (*FOS Life Manual*)
- *William Murray, Lord Mansfield: His Life, Times and Legacy – Good Faith and Good Works*, Australian Insurance Law Journal: (2016) 27 ILJ, 75 (*Mansfield Article*)
- *Total and Permanent Disability Life Insurance – Degree of Certainty - Unlikely Ever – Never Say Never*, accepted for publication in the ILJ 2017 (*TPD Article*)
- Professional Liability chapter, in *Insurance Disputes*, Fourth Edition, Routledge, with Graham Reid, January 2017 (*Insurance Disputes Chapter*)

- Australian Centre for Financial Studies, Insurance Research Program Committee, commissioned me to write a paper on the use by insurers of mental illness data: *Data Flows for Life Insurance – Mental Illness Disability Data – Research Paper* published by the ACFS, March 2017 and submitted to the ILJ (*ACFS MID Paper*)

The *Code Issues Paper*; *Code Review Report*; *Sutton*; *Mansfield Article*; and the *TPD Article* are submitted for assessment.

The *AIDA Discrimination Paper*; *AIDA Self Regulation Paper*; *Masel Lecture*; *FOS Life Manual*; *Insurance Disputes Chapter*; and the *ACFS MID Paper* are submitted to establish and demonstrate the originality and influence of the publications and work.

### Submission Outline

1. There are two major pieces of work (the *Code Review* and *Sutton*) and a number of themes that are the subject matter for this submission. The Insurance Council of Australia<sup>1</sup> appointed me as the Independent Reviewer of the General Insurance Code of Practice, under the Code and the Terms of Reference, on 3 May 2012.
2. The *Code Review* work took about two years and involved the *Code Issues Paper* in October 2012 of 111 pages and the *Code Review Report* in May 2013 of 205 pages. The majority of my recommendations were accepted and the report has made a contribution to the rethinking of **self-regulation** and the place of voluntary codes in financial services. By then I was writing, with Professor Robert Merkin QC *Sutton on Insurance Law* for its 4<sup>th</sup> Edition. It is two volumes, 24 chapters and about 2100 pages excluding tables and index; my contribution was 12 chapters totalling about 960 pages.
3. The *Code Review* work, particularly on government agency regulation and self-regulation, influenced the pervasive material in *Sutton* on **regulation**. It was the subject of the *AIDA Rome* paper in 2014 on *Principles for Self-Regulation*; the paper was published by AIDA.
4. *Sutton* was published in 2015. Its themes are set out below. Those themes are in turn influences in the other work for this submission. There are seven main themes in the publications which I present in this submission.
5. The **historical influences** in relation to my *Code Review* and the historical contextual material in *Sutton* stimulated my interest in the wider influences on the development of commerce, insurance and law, with a central interest in the ethical foundations of the law and regulation. This aspect was also developed in the *Masel Lecture* and the article *William Murray, Lord Mansfield: His Life, Times and Legacy – Good Faith and Good Works*.
6. There had been a number of issues raised in my *Code Review* about **mental illness, insurance and discrimination**. I spoke at AIDA in Rome 2014 on Insurance Discrimination Law and the paper was published by AIDA. Then

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<sup>1</sup> The peak industry body for general insurers in Australia.

in 2016, the Australian Centre for Financial Studies commissioned me to write the *ACFS MID Paper* on the use by insurers of mental illness data. The historical perspective and the regulatory framework were important features of both papers.

7. A number of the *Sutton* themes were first opened out in my *Professional Indemnity Insurance Law*. The main themes were, in decreasing order of connection with *Professional Indemnity Insurance Law*, as follows. The first theme is the identification, development and application of **the indemnity principle**. The second is the adaptation and application of the analysis of contracts by **primary and secondary obligations**. This theme is in *Sutton* on the main concepts in insurance as well as liability insurance issues. The *Liability Disputes Chapter* condenses this thinking and account. The third theme was a renovation of how **life insurance** issues should be analysed and presented. This life insurance material was then adapted and infused with practical guidance on the decision making process on some issues for the *FOS Life Insurance Manual*. I developed an aspect of life insurance in the *TPD Article*. Each of these themes are in my submission original in concept and execution. Each has influenced the development of the law by legislation and the courts.

## Sutton

1. Professor Robert Merkin QC and I co-authored the Fourth Edition of Australian Insurance Law by Professor Kenneth Sutton. We renamed it: *Sutton on Insurance Law*. It is the first posthumous edition. There is very little of the third edition text remaining in the Fourth Edition for the reasons set out in Chapter 1.<sup>2</sup> Professor Robert Merkin QC and I sourced ideas, structure and text from our previous work: mine in PIIL I and II and the *Code Review*. I wanted an academic structure and a commercial approach that was accessible to practicing lawyers. The commercial context and purposes of the insurance contract were important elements in the analysis of the law affecting the contract. We each took the lead on parts and chapters. Chapters 2-5<sup>3</sup> (Ian) deal with matters which are logically prior to the consideration of the insurance contract because they set out, analyse and criticize the legal and commercial context in which the contract is formed, operated on and claimed on. Chapters 6-8 (Rob) cover the issues which arise in relation to the contract before it is formed. Chapters 9 & 10<sup>4</sup> (Ian) cover issues necessary to understand before considering the contract itself. Chapters 11-14 (Ian) cover three<sup>5</sup> of the five<sup>6</sup> main terms necessary for a valid contract. Chapters 15-19 (Rob) cover matters arising in and from a claim on an insurance policy. Chapters 20-24 cover the five main types of insurance. I took the lead on life (Chapter 21) and liability (Chapter 23) insurances. In the more detailed commentary below I refer only to the chapters on which I took the lead.

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<sup>2</sup> Particularly *Sutton*, para. 1.50.

<sup>3</sup> *Nature and Types of Insurance; Key Concepts; Regulation; Intermediaries and Selling Insurance.*

<sup>4</sup> *Formation, Terms and Form of the Contract; Construction and Effect of Insurance Contract Terms.*

<sup>5</sup> *Parties and Claimants; Duration and Renewal; Premium – Payment and Return.*

<sup>6</sup> *The other two are firstly terms on the risk, which run throughout the book and secondly, terms on limits and the measure of indemnity – Chapter 16.*

2. The publication of the book marked thirty years since the passing of the *Insurance Contracts Act 1984 (ICA)*.<sup>7</sup> The changes in insurance markets, insurance law and the approach to law books in this period are themes in *Sutton*.<sup>8</sup> The two great reforms of the *ICA* were that pre-contractual misrepresentations and non-disclosures had proportionate rather than disproportionate effect and the same would apply to a breach or non-compliance with a term of the contract. These two great consumer protection measures opened the way for the **codes** adopted by the insurance industry and by intermediaries in their dealings with consumers. Most consumer disputes are today resolved not by the operation of strict legal principle in the courts but by dispute resolution processes established by **self-regulation**. Those processes are increasingly important.<sup>9</sup>
3. One of the key features of *Sutton* is its approach to the interaction of much new Australian legislation and the common law. The *ICA* is undoubtedly the widest ranging measure of substantive insurance law reform that has been achieved on the subject in the worldwide jurisdictions of the common law. The statute was not intended to be all encompassing, to the entire exclusion of the common law upon some subjects. Moreover, the *ICA* was itself written against the background of the common law and sometimes to remedy a particular mischief that was seen to exist in the pre-1984 state of the common law. Over the past 30 years, the market in insurance has also changed. New insurance products have developed. Technology has altered the mechanisms of business dealing. New legal issues have emerged. In this way, the common law, as well as filling the gaps left in the fields of general and life insurance continues to apply in the areas of marine insurance and reinsurance. It remains a vital backdrop to the whole law of insurance. Therefore, where appropriate, the common law is discussed, both to explain the significance of the *ICA* and to provide a comprehensive analysis of the law where the *ICA* has no application or is otherwise silent.<sup>10</sup>
4. A further important new feature of the current edition of *Sutton* is the enhanced emphasis on **regulatory** matters: the growth of **self-regulation** and the General Insurance Code of Conduct. But mandatory regulation under legislation has been transformed in the past decade, with increased scrutiny by the statutory regulators on the conduct of insurers and their officers, and in particular in respect of insurers' solvency and permitted dealings. At points this impinges upon substantive law, even more so since the passing of the *Insurance Contracts Amendment Act 2013* under which regulatory intervention rather than private enforcement is regarded as a more efficient means of ensuring that insurers adhere to the rules which regulate their dealings with policyholders under the *ICA*.<sup>11</sup>
5. On the basis of this view of the future, we predicted three developing themes in Australian insurance law. Firstly, on the basis of the parallels in some features of the Australian and UK legislation, UK judicial decisions would become more relevant and influential than they have been since

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<sup>7</sup> It was also ten years since Professor Sutton's death.

<sup>8</sup> *Sutton*, para. 1.10.

<sup>9</sup> *Sutton*, para. 1.30.

<sup>10</sup> *Sutton*, para. 1.60.

<sup>11</sup> *Sutton*, para. 1.70.

1984. The same applies but more lightly to the influence of New Zealand law on Australia. Secondly, the law in all its forms, legislation, regulation, self-regulation, and judicial and consumer tribunal decisions, in each relevant jurisdiction, in responding to market changes, would move closer to each other. Thirdly, over time, insurance globalisation would accelerate: as legal solutions to commercial problems are tested by the response of our social and business communities, the commercial problems and solutions of other countries, particularly the UK and New Zealand, would form an important part of each other's development.<sup>12</sup> The influence of *Sutton on Insurance Law* is proving to be important in these developing themes.

6. An outline of the themes in *Sutton* is in annexure B.

## **First Theme - Historical Influences**

### ***General***

1. I have in the publications attempted to place the account of the current law and its development in its social, commercial and historical context.
2. The *Code Review* was an important one in the development of the Australian insurance industry. The context of the state of the industry, the recent natural disasters and the regulatory matrix in which the industry and its stakeholders work shaped the issues for the *Code Review*. The history of the Code from the first Code in 1994 illuminated some important issues.
3. *Sutton* sets its account of the law in historical context. Without a sense of the past, the essential context for understanding if not interpreting the law is absent and the capacity to develop the law for a changed or new purpose is frustrated or lost.<sup>13</sup> The origins of Lloyd's and mutuals are important in the context both of the development of the law and the limits and prospects of regulation.<sup>14</sup>
4. The history of Australian financial services regulation is that consumer protection regulation, until the natural disasters of 2011–2013 has been introduced through a careful process of inquiry, report consideration and consultation. It is prudential regulation which has been introduced usually in response to a crisis. The natural disasters generated some regulatory change. The track record on the consumer protection regulation of the insurance industry argues strongly that legislative intervention and government agency regulation can produce inadequate outcomes for Australian consumers.<sup>15</sup>
5. The histories of *life*<sup>16</sup> and *liability*<sup>17</sup> insurance are important for similar reasons.

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<sup>12</sup> *Sutton*, para. 1.80.

<sup>13</sup> *Sutton*, paras. 2.450 and following.

<sup>14</sup> *Sutton*, paras. 4.200–4.320.

<sup>15</sup> *Sutton*, paras. 4.440–4.462.

<sup>16</sup> *Sutton*, paras. 21.1470–21.1580.

<sup>17</sup> *Sutton*, paras. .

6. I was asked by AILA to deliver the Geoff Masel Lecture in 2015. The lecture was received by acclaim, not only touring nationally but also to New Zealand and to AIDA in Vienna. It has been given to government, regulators, industry associations and private firms and insurers. I was then asked to contribute an article on Lord Mansfield for the 250 year anniversary of *Carter v Boehm*.<sup>18</sup> I was intrigued by the biographic origins of the doctrine in his life and work. A number of the themes in the Masel lecture were developed in the *Mansfield* article.

***William Murray – Lord Mansfield – Life, Times and Legacy – Good Faith and Good Works***<sup>19</sup>

*Introduction*

7. There is no single sentence which could map or circumnavigate William Murray. The dimensions which shaped him were the times of revolutions: philosophical, religious, political, commercial, industrial and legal. The features of our modern world which mark the distinctions between the old and the new world and between the ancient and the modern world were first outlined during his life and shaped his legacy. The Glorious Revolution of 1688, the first disclosure of Lloyd's of London in a London gazette that year, the South Sea Bubble and the Mississippi scandal on the death of Louis XIV of France are together the left hand bookend for our story.
8. The year 1788 is the righthand bookend for our story. It is just after the beginning of the industrial revolution. European history, society and law begins to influence the Australian continent. It is also a proxy for the emergence of the modern Lloyd's from the pre-history of insurance. It is the year Lord Mansfield retired. 1788 was the last year of the old world before the French Revolution, which pitched Europe into an age of revolutions ending in 1870.

*Endpiece*

9. In 1788, the year Arthur Phillip arrived at Sydney Cove, Mansfield retired to Kenwood, his home on Hampstead Heath, now the venue for outdoor summer concerts. He died in 1793 the year in which Louis XVI of France was executed.
10. Mansfield's fame does not rely on the range of matters on which he conducted trials and heard appeals. It is in his methods of deciding cases and the fundamental values on which they rested; his was a rare ability to distil principle from precedent, to understand human nature and that

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<sup>18</sup> William Murray, *Lord Mansfield: His Life, Times and Legacy – Good Faith and Good Works*, *Australian Insurance Law Journal*: (2016) 27 ILJ, 75

<sup>19</sup>The first footnote was: I am very grateful to Helen Enright for her research for this article and to Professor Robert Merkin QC for permission to use material from Enright and Merkin, *Sutton on Insurance Law*, 4<sup>th</sup> Edition. I also thank Sts Paul and James, this Easter, for their dispute about the eschatological priority between good faith and good works: James epistle (2:14-26) – “faith is dead if it is separated from good deeds” and compare Paul's epistles to the Romans (3:21-5:11) and the Galatians (2:15-3:14) – “the righteous man finds life through faith”, which prompts a pun of dubious merit.



morality was an essential element of the law.<sup>20</sup> Mansfield had a natural instinct for justice. It was based in the philosophy of the Enlightenment and an age of reason. The law must be based on “principles of natural justice and equity”<sup>21</sup>, morality and commonsense; precedent must yield to principle so divined. He was a humanist.<sup>22</sup> Mansfield’s singular judicial work was in his directions to the juries. A jury undirected would reach a decision on the facts but there would be no unifying principle to link and be extracted from the variety of facts and decisions. He supported fairness, protection of intellectual property (applying Locke’s “social contract” theory<sup>23</sup>), professional privilege, religious freedom, women and underprivileged women, while hostile to workers’ efforts to improve their conditions and suppression of freedom of the press.<sup>24</sup> He was the founder of English commercial law.<sup>25</sup>

11. Mansfield is said to have been risk averse preferring the judicial work to politics: it was dignified, quiet and secure.<sup>26</sup> Lord Chief Justice Murray’s career brought him wealth, fame and power, but his decisions on abolition, insurance, gender, support of toleration brought him public criticism and odium.
12. Mansfield’s directions and judgments continue to give our common law, across an unparalleled spectrum, that principle. He made his judgments on the principle that “as the usages of society alter, the law must adapt itself to the various situations of mankind”, leading John Baker to describe him as “one of the boldest of judicial spirits” and “the founder of the commercial law of this country”.
13. Mansfield is accused of a relentless use of patronage to favour his family and associates: the currency of the age.<sup>27</sup> The meek might inherit the earth but never win appointment to high office. The currency of patronage allowed no debts or debtors in success. He was criticized as a politician: a pretender, a coward, a side switcher and a time-server. Mansfield, a self made man, knew he could not achieve by the use of power for he had none: no estates, business or hereditary title. But he knew he had judgment and could persuade. Mansfield saw himself as an adviser. And this is, I think, where Mansfield the politician meets Murray the man and Mansfield the judge. He was not only legally brilliant but also his financial acumen was deployed for his family, his circle and his country. Mansfield’s negotiation and statecraft skills formed the Newcastle-Pitt ministry which saved the country from ruin. His grasp and persuasion on the personalities and issues, domestic and foreign, made him a trusted and effective adviser for his government and country.
14. Mansfield’s life like any worthy of the name leaves unanswered questions. Mansfield had shifted from a son and brother of Jacobite rebels in 1715,

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<sup>20</sup> Poser, 402.

<sup>21</sup> Poser, 214.

<sup>22</sup> Poser, page 216.

<sup>23</sup> Poser, 329,320.

<sup>24</sup> Poser, page 218,219.

<sup>25</sup> Poser, page 243.

<sup>26</sup> Poser, page 87,88

<sup>27</sup> Poser, page 132 and Chapter 10.

through a treasonable and capital adherence to the Jacobite cause in 1725, to a lead prosecutor of the survivors of the Butcher of Culloden in 1745. How could it be that a man who gave a legal framework and effect to Rousseau's social contract on the determinative question of equality before the law – for merchants, blacks, slaves, insurers, cross dressers – support a cause not only monarchist but absolutist behind its romantic guise ? Was his young allegiance a young man's loyalty to a family distant in time and, otherwise, emotion ? Or an adolescent passion for his country and a romance for the age ? Murray and Mansfield certainly feared the antecedents. His political and other enemies, particularly Pitt, taunted him with the taint.

15. Did his Jacobite roots, publicly exposed in 1753, make him less confident and less effective as a politician ? Did he counter weigh that burden with judicial and judicious energy and acuity in the filigree framework of late eighteenth century common law – a freedom to distil human principle and morality from tradition and precedent in equal measure ? The fascination continues, not just with Mansfield, but with and for all who follow his life and times. Mansfield is best known to us as the author of the doctrine of utmost good faith. But he lived a life of not only good faith but also of good works, in the most turbulent and exciting of times.

## **Second Theme – Regulation, Self-Regulation and Codes**

1. The treatment of regulation in the publications is unique. *Sutton* gives a clear account of the law and practice in the context of the theory, main concepts: main legal and commercial issues and principles, history and themes particularly of post WWII financial services regulation. There is a detailed account of the insurance entities and their markets which are the subjects of regulation. There follows a description and analysis of the regulatory agencies (APRA, ASIC, ACCC, ICA and Ratings Agencies) and their legislation which establishes and maintains each and the legislation or regulation for which each is the statutory or responsible body. The insolvency of an insurance corporation is highly regulated and there is a treatment of it in this context.
2. The material on self regulation is also unique because of my work on the *Code Review*. The place of self-regulation is uncertain because of uncertainty in both theory and practice about the definition and proper domain of each. It is then possible to analyse and design proper criteria for self regulation both its process and content. Self regulation must have coherence with regulation and there are then conditions necessary for self regulation to work well in which self regulation. The advantages of self regulation become clear through an historical review, a consideration of the principles and practice and the current insurance self regulatory codes.
3. The Code has standards about fairness and there is proposed legislation on the utmost good faith duty and on unfair contract terms. The relationship among the three different types of fairness duty is critical for the development of the law.

4. The *Code Review* took place at an important time from three perspectives. Firstly, the natural disasters of 2010 and 2011 caused exceptional and distressing loss in our communities, and a number of inquiries into those natural disasters highlighted the role of insurance in paying claims and helping our communities to recover. There were some criticisms of insurers in that context and some recommendations about changes to insurers' practices, and to the Code. Secondly, insurers continued to operate in a competitive market and were (and are) experiencing volatility in their underwriting results, and uncertain returns on their investment portfolios. Thirdly, the speed and scale of legal and regulatory changes affecting the industry was and is greater than they have ever been. The Insurance Council of Australia (ICA) brought the triennial review forward by 12 months to enable the Review to focus on these issues.
5. There were five Major Reports on the insurance industry since April 2011 (Major Reports). They were reviewed in the *Issues Paper*, and their findings, recommendations and the governments' response formed the basis of the *Issues Paper*. I identified 16 groups of issues:

Issue 1 – Code Publicity, Awareness and Engagement

Issue 2 – Code Content, Presentation and Style

Issue 3 – Code Coverage

Issue 4 – Principles, Objectives and Legal Status

Issue 5 – Training and Education

Issue 6 – Buying Insurance

Issue 7 – Policy Terms and Coverage

Issue 8 – Premiums – Payment and Cancellation

Issue 9 – Claims

Issue 10 – Claims, Complaints and IDR

Issue 11 – Claims and Disputes, IDR and EDR

Issue 12 – Code Monitoring and Investigation<sup>28</sup>

Issue 13 – Financial Hardship

Issue 14 – Natural Disasters

Issue 15 – Code Governance

Issue 16 – General Issues

6. It was important to emphasise that the Code is self-regulation. It is not legislation nor is it merely market practice. The place of self-regulation is both blurred and fragile in the matrix of legal and government agency regulation which dominates the framework for the regulation of the general insurance industry. The *Code Review* offered an important opportunity to consider the Code as a piece of self-regulation, within the matrix of regulation of the general insurance industry. The *Code Review* aimed to place the Code in a stable position in that framework by testing the Code against self-regulation principles for the general insurance industry. It was time, in my view, for self-regulation to reclaim its place for general insurance in Australia.
7. Code governance emerged as the single most important overarching issue for my *Code Review*. It is essential for the Code to be set in a governance

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<sup>28</sup> There was a typographical error in the subsequent numbering of the issues. There was no issue 13.

framework in which the governance body is independent, expert, informed and resourced. The framework must be visible and accountable.

8. I considered developments in the industry, changes in law and regulation and recent disaster events; the issues and recommendations in the *Final Report* were developed in that context. The three most pressing issues were, in my view, financial illiteracy, financial hardship and education and training. The breadth and depth of financial illiteracy in our community is one of our greatest challenges. It is a core challenge for the insurance industry. Recent research supported both the concern and the importance of progress to a solution. Findings in recent reports that the insurance product disclosure regime has significant shortcomings are credible and persuasive. It is an inadequate solution to a problem of an inability or unwillingness to read, to rely on a different type and presentation of disclosure — while that might improve the position, by definition, it cannot solve the problem. I have recommended that the Code standards should reflect a fuller commitment to financial literacy. The Code Governance Body should be tasked with involving and guiding Code stakeholders in such programs.
9. The issue of financial hardship was the subject of a number of consultations and forums — one was devoted exclusively to the issue. A working group took the development of the issue from those forums and worked with me and advised me on a draft Financial Hardship Guideline which formed a part of the New Code. I was delighted to report that the Guideline reflects a broad stakeholder consensus on the issue. This Financial Hardship Guideline was an Australian first for any industry.
10. There was a strong and deep consensus from my consultations, forums and the submissions that, even with the considerable work to date and continuing, the ICA, Code Participants and the Code Governance Body must redouble their resources and efforts in training and education. The terms of the Code are a clanging symbol only, if the performance of Code Participants, employees, agents and Service Suppliers who work with customers and the community do not understand and implement the spirit and the standards in the Code. There are sufficient instances of matters which involve a breach of the law, policy or the IC Act as well as the Code, to cause concern. The education and training that is currently being carried out was clearly not adequate for its purpose. I recommended an enhancement in the quality and quantity of education and training, including on financial hardship and assistance for those who are traumatized by natural disaster. The Code Governance Body should also be tasked with involving and guiding Code stakeholders in such programs.
11. I recommended a refurbished New Code. One that has principles, standards, guidelines and service levels. One that is in plain English. The guidelines and service levels focussed on specific areas: financial hardship, IDR, claims, natural disasters and Code monitoring and enforcement. They were designed to give all stakeholders more consistency and quality of experience with general insurance.
12. There were also important challenges for our community and the general insurance industry which lay ahead of us. They are, on any measure,

gravely more significant than the issues covered in my *Code Review*. The first challenge is how to develop a built environment that reduces hazard exposures in the community, leading to a reduction in claims value and volume. The second challenge arose from changes in disability and accident compensation schemes. The National Disability Insurance Scheme (NDIS), and the associated National Injury Insurance Scheme (NIIS) are major developments in the support for Australians with a serious disability. The third challenge was access to insurance and its affordability. This issue has never been more problematic nor its solution more vital in the context of significant community risk but significant underinsurance. There is a related and growing demand for simple products. With greater public and political attention being given to equity issues and the larger numbers of people who are seniors or disabled, concern is growing about access to general insurance for all members of Australian society. Fourthly, the general insurance industry had been through more than two decades of constant regulatory change in prudential and consumer protection or market conduct regulation. The number of reforms attempted simultaneously over a long time had stretched the resources of all stakeholders. It was time, in my view, for a reassessment of the business of regulation.

13. I mentioned these challenges for another purpose as well. I offered the proposals in my *Final Report* as measures to improve the performance of the general insurance industry and the community's trust and confidence in it. I considered that they struck a fair balance among the interests involved and that they would lead to cost effective outcomes. I also offered the proposals in my *Final Report* to position the general insurance industry to enable it to meet the grave challenges which lay ahead of us and which were and are urgent and compelling for us all. I recommended my proposals in this context, above all.
14. There is more detail, based on material in the publications, in Annexure B.

### **Third Theme - Mental illness, Discrimination and Insurance**

#### ***Discrimination and Mental Illness***

1. It is essential for an insurer to discriminate ! The sustainability of the insurance sector means that over time the spectrum of risks accepted must be on prices and terms that reflect the risk's place on that spectrum. So, differentiation on the basis of risk is essential to the sale of insurance. Insurers separate policyholders into different risk pools based on their characteristics and past behaviour. Risk classification or discrimination thereby allows insurers to appropriately price and incentivize risk reduction. This is how the insurance industry makes profit in the long term.
2. However, the ability of insurers to discriminate among policyholders is limited. In Australia, anti-discrimination laws impose limits on the ability of insurer's to discriminate among policyowners and lives insured on the basis of their inherent characteristics. In the case of race, for example, these limits are total: the law prevents an insurer from differentiating people on the basis of their race or ethnicity. On the other hand, discrimination on

the grounds of age, disability and gender is permitted by the operation of conditional exceptions to the anti-discrimination law framework.

3. Generally, these exceptions operate by allowing insurers to treat policyowners differently on the basis of the above characteristics only if the discrimination is 'reasonable' having regard to actuarial or statistical data. Normative judgments about what constitutes 'reasonable' discrimination are therefore informed by, and grounded in, fact. When such data is immediately available and widely accepted, the 'reasonableness' of specific insurance exceptions to anti-discrimination law is uncontentious. But what happens if there is a paucity of data in certain areas that inform an insurer's business, or that data is unreliable?
4. This question, in this context, arises importantly in disability discrimination in relation to mental illness.
5. The AIDA article focussed on insurance discrimination, its nature, background and its legislative framework. It considered the role of the Australian Human Rights Commission and enforcement dimensions. The article reviewed the elements and exceptions particularly for disability discrimination. It then focussed on disability discrimination and mental illness in a case study. The article concluded that the development of better experiences and results for customer and insurers depends on practical solutions at least as much as legal remedies.

### ***Reflections***

6. The article concluded with the following reflections.
7. The critical issue is data for insurance underwriting and for claims assessment. It is not only the insurance discrimination legal exemption or defence but also the practical barrier to better outcomes for the insurance industry and for citizens with mental illness.
8. The available data is useful background but it is not sufficiently authoritative, objective, or predictive to influence underwriting for mental health issues and therefore does not improve access to insurance products for Australians with mental illness.
9. The data is very subjective and the clinical material depends heavily on unverified patient self-reporting of incidents, traumas and reactions.
10. The data does not rate severity in any generally accepted categorization and therefore it is not very predictive.
11. A good contrasting example, compared with the situation above, is that the data for certain heart problems is sufficiently authoritative, objective, or predictive to influence underwriting; it is also objective, clinical and rates severity in accepted categories. The data for such heart problems is influential in pricing and terms for life insurance.
12. The margins on some consumer insurance products, eg travel insurance

are so slim and the administration is so cost intensive that it would be difficult to produce significant changes in the short or medium term. The focus on life insurance products, particularly disability, is right and important.

13. There is very little data on claims experience, the most relevant data for insurers, for mental illness. An insurer is left with three responses to an applicant who has mental illness: reject, impose an exclusion or apply a loading to increase the premium.
14. There is a troubling dichotomy that appears. The underwriting process tends to see, or assumes, mental illness as permanent but at claims time, mental illness can be seen as either causative of the claim or the claims process works to disprove the permanence assumption.

### ***Mental Illness Data in Insurance***

#### ***Commission***

15. ACFS commissioned me to write a paper as a part of the ACFS Commissioned Paper Series 2016. It drew on the *AIDA Discrimination Paper*. The background was described as:

*Due to the scarcity of publicly available data in the insurance sector, what inquiries could be made about funding being received to develop data? To what extent would having more of this data publicly available assist individual customers of insurance companies in making better informed decisions about their risk?*

*To what extent would insurance companies also benefit from access to more data, with regard to being better able to price premiums? What are the legislative barriers to the collection and public availability of such data? How does Australia compare to other nations on availability and access to insurance data?*

*The questions on data in insurance may be applied to general insurance, life insurance, health insurance, and/or other forms of specialised insurance.*

16. The commissioned paper would:
  - a) Provide an overview of the primary data sources currently available for research in the selected area (although this should not be the main focus of the paper).
  - b) Identify obvious data availability deficiencies with reference to examples in comparable countries, possibly drawing on published research studies to illustrate the public benefits of increased data availability.
  - c) Consider issues associated with enabling the provision of private, commercially valuable data for academic research.

- d) Identify situations where data sharing among private entities may facilitate both research and socially beneficial economic outcomes.
  - e) Identify and suggest possible mechanisms for improving researcher access to privately (or government) held data.
17. I attempted to chart two maps for data flows. The first is a map of the data that is disclosed, collected, used and disseminated during the life cycle of a life insurance policy: disclosure by the policyowner or life insured, use by the life insurance corporation (LIC) for underwriting within its pricing framework and aggregated dissemination by public and private data agencies.
  18. The second was a map of the agencies, public and private, which collect, use, disclose and disseminate data.

### *Map*

19. The mapped conclusions from the analysis showed that there are:
  - a) some phases in the insurance life cycle for which there is significant quantity and quality of data;
  - b) some phases for which there is less than significant data;
  - c) some phases for which there is insignificant data.
20. The quality and quantity of MID is always less than data on other causes of claim.
21. The mapped conclusions from the analysis also showed that there:
  - a) are phases for which no data agency is involved;
  - b) are different data agencies involved for different phases;
  - c) is no data agency involved for all phases;
  - d) is no data agency which links data for different phases for analysis or commentary.
22. The analysis of the roles of the various data agencies showed that:
  - a) APRA collects, uses and disseminates significant EFS, FSS and NPCD data with a sophisticated framework and reporting and validating processes for QA. But the NPCD is limited to public, product and PI liability insurance; it does not cover MID;
  - b) KPMG collects, uses and disseminates significant incidence, claim cause and claim cost for MID for its Income Protection Industry Reports. There is no data or analysis for MID for the TPD Industry Reports;



- c) ASIC collects but does not use or disseminate data other than in the context of its industry supervision, investigation and enforcement powers.
23. The NDIS is a significant collector of data about its participant care plans but not in relation to other MID. The NDIS has similarities and differences from a public or private commercial insurer which mean it has different needs for the collection, use, disclosure and dissemination of MID.
  24. The Parliamentary Joint Committee Inquiry into Life Insurance is considering MI issues in submissions from customer advocates and others, but not the submissions from LICs. There are a number of recommendations made in those submissions on the collection, use, disclosure and dissemination of MID.

#### *A Plan*

25. I offered the following suggestions for a plan to improve the quality, quantity and accessibility of MID: a National MI Database.
26. Firstly, APRA's NPCD is widened to include MID:
  - a) review the legislative framework and adapt it so it is fit for purpose;
  - b) review, adapt and amend the reporting standards, specifications and fields, through stakeholder consultation, to ensure best practice data collection ensuring that the KPMG approach is considered for inclusion;
  - c) APRA carry out the same role for the National MI Database that It does for the NPCD;
  - d) resource APRA accordingly.
27. Secondly, an expert independent study be commissioned to consider and report publicly on the currently available MID.
28. Thirdly, the data checking and validation processes for the currently available MID and the National MI Database consider inputs from life insurance industry expertise and independent experts, including, based on work to date: KPMG, Rice Warner and the Actuaries Institute (Expert Engagement).
29. Fourthly, APRA's processing, analysis and commentary about MID include Expert Engagement.
30. Fifthly, the use and dissemination of the National MI Database be on the widest public access basis
31. The Plan might be considered as a working model for the development of other data flows for the insurance of our community.

32. A number of the main stakeholders have expressed enthusiasm to explore and consider the plan.

## **Fourth and Fifth Themes - The Indemnity Principle and Primary and Secondary Obligations**

### **Introduction**

1. *Sutton* develops an argument about the nature, development and application of the indemnity principle. It is set in the context of an analysis of the insurance contract. The text on the indemnity principle is written in two strands. The first is a more analytic strand which develops certain arguments around the indemnity principle summarised briefly in this submission. The second strand is a more traditional text book with statements of law fully supported by authority and clearly states the principles but also gives, particularly practitioners with limited resources or experience in the area, some sense of the penumbral issues outside the clearer spotlight.
2. The first step in the argument is to consider the distinguishing characteristics of indemnity insurances and third party liability insurances. The conclusion to this first step in the argument is that the distinguishing feature of insurance contracts is the indemnity principle and that the distinguishing feature of third party liability insurances from life insurance and first party loss insurances is the conceptualisation and working out of the indemnity obligations.
3. The second step in the argument analyses the nature of the indemnity principle. The law most commonly analyses the indemnity principle as an obligation about damages and, even more commonly, as a principle about the measure of damages. The cases and other commentaries develop this aspect of the indemnity principle to the exclusion of what is argued is vital to the understanding of the nature of this principle and the work that it does in solving problems and puzzles in insurance law and practice. The indemnity principle is shown as a primary obligation relying on, developing and applying the analysis in *Photo Productions*. The function and implications of an indemnity as a separate obligation for all indemnity insurances are explored in the analysis of the insurance contract. The argument thus defines and amplifies the indemnity obligation, distinguishes it from a measure of damages to a primary obligation, and demonstrates that the application of the indemnity principle so understood solves issues and puzzles in a way which brings greater coherence, certainty and flexibility to insurance law and practice.
4. This application of the indemnity principle is developed in relation to a range of issues set out in Annexure B.

### ***Analysis Summary***

5. It is in the nature of insurance for the benefit of an indemnity to be contingent on the occurrence of the insured event. Then, subject to the

terms of the policy, the insured has a right, although inchoate or not crystallised, to the indemnity. This right will be subject to the terms of the policy, particularly those that deal with claims.

6. After the insured event, the insured may notify the insurer of that event, or, where applicable, of the third party's intention to make a "claim" or that the third party has made a claim. The insured will then make a "claim" against the insurer in the sense of an application for the indemnity. The insured must submit a proper claim within the terms of the policy.<sup>29</sup>
7. It may be that a claim is a formal step or a part of the process by which, as a practical matter, the insured demonstrates his right to an indemnity. The contractual provisions for making a claim may indicate that it is an essential element in the right to an indemnity itself, for example, if the form of the claim is prescribed in relation to the particulars and information to be submitted or if the time for making a claim is limited. Such a term can either be a condition precedent or an innominate term.<sup>30</sup> The legal consequence of the classification of the relevant term as a condition precedent is that the right to an indemnity will not arise until the precondition has been fulfilled. Therefore if the insured does not fulfill the policy's requirements in relation to the claim, the insured has simply not made a claim in a way which will vivify the insurer's **primary obligation** to indemnify. The legal consequence of the classification of the relevant term as an innominate term has the consequence that if the insured does not make a claim within the terms of the policy then the insured is arguably in breach of the policy from which springs the insurer's correlative rights.<sup>31</sup> A term about claims in this context is subject to the *Insurance Contracts Act 1984* s 54.
8. The insured's right to an indemnity is the right to have the insurer perform, in the language of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*<sup>32</sup>, its **primary obligations** under the insurance contract. In other words, in the same way as the payment of the premium is the obligation which the insured must perform or the premium is the benefit for which the insurer has contracted, the indemnity is the obligation which the insurer must perform and the benefit for which the insured has contracted. Once the insured has submitted a proper claim to the insurer there is no intervening act of either of the parties which can be required, whether an ascertainment of the insured's liability by judgment, award, admission or agreement, quantification of liability or payment, before the insured's right to an indemnity arises. The court is a declarer of rights rather than a creator of them.
9. A right to an indemnity in first party insurance, as a **primary obligation** may take the form of the supply of goods or services or the payment of

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<sup>29</sup> *Friends Provident Life and Pensions Ltd v Sirius International Insurance* [2005] Lloyd's Rep IR 135; [2005] EWCA Civ 601 at 141-142 (Lloyd's Rep IR); *Friends Provident Life and Pensions Ltd v Sirius International Insurance* [2006] Lloyd's Rep IR 45

<sup>30</sup> See: *Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 159; (2001) 11 ANZ Insurance Cases 61-492; [2000] WASCA 415 at 26 (WAR); *Lambert Leasing Inc v QBE Insurance Ltd* (2015) 296 FLR 388; [2015] NSWSC 750.

<sup>31</sup> See Chapters 9 ([9.10]) and 10 ([10.10]) on innominate terms.

<sup>32</sup> [1980] AC 827; [1980] 2 WLR 283.

money by the insurer to the insured. Goods and services are clearly not “damages”. The same is more subtly true of money in this context.

10. A right to an indemnity in **liability insurance**, as a **primary obligation**, may take three forms:
  - a) a right to have the insurer procure the third party to forbear in the claim against the insured;
  - b) a right to have the insurer make a payment to the third party to satisfy the claim against the insured;
  - c) a right to have the insurer pay a sum of money to the insured once the insured has paid the third party or the third party's claim against the insured has been ascertained.

These are **primary** rights. The insured's right to indemnity in the first two forms arises on an insured event or claim.

11. If ascertainment were both sufficient and necessary for every method of indemnity, the other indemnity obligations of the insurer could not be performed. It is a further argument against the breadth of the propositions in the *Post Office v Norwich Union Fire Insurance Society Ltd*<sup>33</sup> and *Bradley v Eagle Star Insurance Co Ltd*<sup>34</sup> cases that if ascertainment were a central requirement for a general right to an indemnity, then the above methods of indemnity would not be available.
12. The ascertainment of the insured's liability to the third party must take place before the insured can compel the insurer to pay a sum of money to the insured in relation to the insured's liability, ie to compel the third form of the **primary** right to an indemnity. If the insured's liability to the third party has been ascertained and quantified the insured's claim for relief will be for liquidated damages but otherwise will be for unliquidated damages. The insured will be entitled to recover money or to a judgment against the insurer for an amount of money only when that is known, but this says nothing about the right to the indemnity or the cause of action, their natures or when they arise.
13. If the insurer, at any of these stages, purports to avoid the contract from the beginning or to deny liability under the policy, the insured will have a cause of action for breach of contract. The insured's right to an indemnity, as a **secondary obligation**, is a cause of action for the insurer's breach of contract to indemnify and arises on breach of such a contract by the insurer.
14. *Post Office v Norwich Union Fire Insurance Society Ltd*<sup>35</sup> and *Bradley v Eagle Star Insurance Co Ltd*<sup>36</sup> elide the right to an indemnity with a cause of action in damages for a breach of the obligation to indemnify, by holding

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<sup>33</sup> [1967] 2 QB 363; [1967] 2 WLR 709.

<sup>34</sup> [1989] 1 AC 957; [1989] 1 All ER 961.

<sup>35</sup> [1967] 2 QB 363; [1967] 2 WLR 709.

<sup>36</sup> [1989] 1 AC 957; [1989] 1 All ER 961.

that ascertainment is necessary for both. The decisions in *Post Office v Norwich Union Fire Insurance Society Ltd*<sup>37</sup> and *Bradley v Eagle Star Insurance Co Ltd*<sup>38</sup> may be correct to the extent that they deal with the third form of a right to an indemnity, the right to a payment of a sum of money, but incorrect in relation to the first two forms of the right to an indemnity because the decisions are inconsistent with their very nature. There is clearly a right to and an obligation for indemnity in the first two forms but by their very nature neither of the first two forms can admit of a prior requirement for ascertainment because ascertainment will only arise if the first and second form of indemnity fail.

15. The third method of indemnity where there is a payment to the insured depends on the common law rule that the insured has first discharged by payment the liability to the third party; its variant where there is an indemnity by payment by the insurer to the third party depends on the equitable rule that the insured is not required to pay the third party to be entitled to an indemnity. On this basis, the better view of the authorities is that the above methods of indemnity cannot require ascertainment or payment, and the requirement of ascertainment and payment arises only if the insured claims the indemnity in the form of a payment either direct to the third party or to reimburse itself. This proposition would narrow the width of the *Post Office v Norwich Union Fire Insurance Society Ltd*<sup>39</sup> and *Bradley v Eagle Star Insurance Co Ltd*<sup>40</sup> cases and would lead to the conclusion that a right to an indemnity arises, subject to the terms of the policy, on the occurrence of the insured event. Otherwise, and in occurrence basis policies, while the above forms of the right to an indemnity will arise on the occurrence of the insured event or the claim, the third, a right to payment, will arise only on ascertainment.

### **Conclusions**

16. The above summary analysis leads to the following conclusions. The right to an indemnity under *first party insurance* arises on the occurrence of the insured event or condition.
17. The right to an indemnity against a *sum paid or payment* third party liability insurance arises only on ascertainment or on payment by the insured. It does not arise on the occurrence of the insured event or condition. Here there is *no obligation* for the insurer to protect the insured **nor** to defend the third party claim from the time of the insured event. If the insured pays the third party, the insurer indemnifies the insured by reimbursement; if the insured has not paid the third party, the insurer indemnifies the insured by paying the third party.
18. The right to an indemnity against a **liability** third party liability insurance may arise on the occurrence of the insured event or condition, on ascertainment or on payment by the insured. Here there may be *an obligation* for the insurer to protect the insured *or* to defend the third party

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<sup>37</sup> [1967] 2 QB 363; [1967] 2 WLR 709.

<sup>38</sup> [1989] 1 AC 957; [1989] 1 All ER 961.

<sup>39</sup> [1967] 2 QB 363; [1967] 2 WLR 709.

<sup>40</sup> [1989] 1 AC 957; [1989] 1 All ER 961.

claim from the time of the insured event. If ascertainment were a necessary element of the right to an indemnity, there could never be indemnity by protection or defence. If the insured pays the third party, the insurer indemnifies the insured by reimbursement; if the insured has not paid the third party, the insurer indemnifies the insured by paying the third party.

19. The right to an indemnity against a *claim* under a third party liability insurance may also arise on the occurrence of the insured event or condition, on ascertainment or on payment by the insured. Here there may be *an obligation* for the insurer to protect the insured **or** to defend the third party claim from the time of the insured event. If ascertainment were a necessary element of the right to an indemnity, there could never be indemnity by protection or defence. If the insured pays the third party, the insurer indemnifies the insured by reimbursement; if the insured has not paid the third party, the insurer indemnifies the insured by paying the third party. The insured event under a “claims made” policy would be the submission of a claim by the third party against the insured and it may be arguable that under a “claims made” policy, because it is more explicitly providing an indemnity against liability or claims, all three forms of the right to an indemnity will arise on the occurrence of the insured event.
20. There is more detail, based on material in the publications, in Annexure B.

### **Sixth Theme - Life Insurance**

1. The main genus of classification in the insurance taxonomic hierarchy is between general or indemnity insurance and life assurance now more commonly known as life insurance. Life insurance itself has two main species, risk insurance and investment life insurance; the former shares some characteristics with ***indemnity*** insurance but the latter is its own type.
2. A life insurance policy is a contract in which, for consideration, the insurer promises to pay the policyowner or his beneficiary, nominee or estate a sum of money on the life insured's death or a nominated date. The classic characteristic of life insurance is that: one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life.<sup>41</sup>
3. For these reasons, cases on life insurance cannot necessarily or without modification be applied to indemnity insurances. Life insurance authorities provide assistance in relation to the formation of the contract, the form of the contract, the parties to the contract, the duration of the contract and insolvency. They have little or nothing to say in relation to assignment, claims and defences, or subrogation, in indemnity policies. The reasons for each of these are as follows. Firstly, in relation to assignment, the law treats an investment life insurance policy as property or an interest which is readily assignable but an indemnity insurance, particularly a third-party liability policy, is a personal contract which cannot be assigned. Secondly, a life insurance contract is treated as one contract throughout its duration, which can be a number of decades, even though “renewed” annually, but an

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<sup>41</sup> Sutton, para. 2.360.

indemnity policy is treated as a new contract on each renewal. Thirdly, an aspect of the principles of illegality affecting insurance policies gives rise to different views when applied to indemnity insurances from those that arise when applied, as they are more commonly, to life insurances. This is the principle that a person cannot insure against the person's own deliberate act or crime. Finally, as a matter of practicalities rather than law, life insurance cases have little to say on the minimum and maximum amount of cover.<sup>42</sup>

4. The **indemnity principle** becomes an important contrast for the purposes of the definition of life insurance<sup>43</sup> and this contrast affects the key concepts and description of life insurance product types.<sup>44</sup>
5. The issue of proof of an insurance claim and the relevance of the insurer's opinion is examined. The conclusion is that the legal and evidentiary gap between a lawfully formed but objectively wrong opinion of the insurer and an unlawfully formed but objectively wrong determination by the insurer is so narrow that no case has threaded its way through these clashing rocks. While the health of the rule is no longer robust it seems too soon for the last rites. The vestiges remain, ripe for appellate review.<sup>45</sup>
6. The description of insurance product types has helped reshape and re-align the law away from some errant first instance phrasings which were given exaggerated credibility by the courts, tribunals and life industry.<sup>46</sup> While these sections of the work are regularly cited, and always with approval, the influence of the work is most seen in relation to the key ideas of: degree of certainty,<sup>47</sup> labour market test<sup>48</sup> and date of assessment.<sup>49</sup> I developed the degree of certainty issue into a separate article: *Total and Permanent Disability Life Insurance – Degree of Certainty - Unlikely Ever – Never Say Never*.<sup>50</sup> The trigger idea is also developed for life insurance.<sup>51</sup> **Regulation** is also an important theme for life insurance.<sup>52</sup>
7. The section on group life insurance is unique in its scope and detail.<sup>53</sup>
8. The utmost good faith doctrine comes closer to the “panacea for unfairness” instrument envisaged by the ALRC for life insurance with a focus on the under-realised ICA, section 14.<sup>54</sup>
9. The grounds and remedies for misrepresentation and non-disclosure in life insurance are unique and special problems in the ICA section 29<sup>55</sup> are

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<sup>42</sup> Sutton, para. 2.360.

<sup>43</sup> Sutton, para.21.50.

<sup>44</sup> Sutton, para.21.220 – 21.460.

<sup>45</sup> Sutton, para. 21.120 – 21.165.

<sup>46</sup> Sutton, para.21.220 – 21.460.

<sup>47</sup> Sutton, para. 21.380.

<sup>48</sup> Sutton, para.21.360.

<sup>49</sup> Sutton, para.21.430.

<sup>50</sup> *Total and Permanent Disability Life Insurance – Degree of Certainty - Unlikely Ever – Never Say Never*, accepted for publication in the ILJ in March 2017.

<sup>51</sup> Sutton, para. 21.440 and the sections on product types generally: 21.220 – 21.460.

<sup>52</sup> Sutton, para. 21.470.

<sup>53</sup> Sutton, para. 21.480-.21.640.

<sup>54</sup> Sutton, para. 21.680-.21.710.

resolved in those sections.<sup>56</sup> This material is based on the analysis I presented to Treasury, the insurance industry and consumer advocates as a part of my work on the ICA 2013 amendments. The new section 29 is based on the consensus I was able to develop for a change to the law.

10. The issues of misconduct and illegality present differently for life insurance and the question of innocent third party rights in relation to recovery through the wrong-doer are the subject of some suggested resolutions here.<sup>57</sup>
11. The material on parties and claimants deals with third party beneficiary rights. The assignment of a life policy considers the **primary and secondary obligation** approach and then moves into the unique statutory provisions.<sup>58</sup>
12. The sections on duration deal with the challenge of aligning market based terms with common law, legislative and regulatory precepts.<sup>59</sup>
13. The certainty of main terms there is developed for the sum insured<sup>60</sup> and premium<sup>61</sup> in relation to life insurance.
14. The examination of life insurance law is placed in its historical context.<sup>62</sup>
15. This material was then adapted and infused with practical guidance on the decision making process on some issues for the *FOS Life Manual*.

## Seventh Theme – Liability Insurance

1. The **indemnity principle** is given an extended application to liability insurances in Chapter 23.<sup>63</sup> It enables an accurate definition of liability insurance and in contrast with first party insurances and that in turn gives an analysis which supports the identification of the proper subject matter of liability insurance.<sup>64</sup>
2. The “six elements” analysis for liability insurance is unique. The chain of events leading to a claim by the insured or a third party beneficiary under a third party liability policy falls into a pattern. The six elements reflect the pattern of events under a third party liability policy. An insured activity involves conduct by the insured that affects the third party. The relevant main contingency or the insured event for a third party liability insurance is characteristically an occurrence in an “occurrence basis” policy – the insured's conduct causes the occurrence. The third party then suffers a loss as a result of the insured's conduct. The third party will make a claim

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<sup>55</sup> Sutton, para. 21.780-21.840.

<sup>56</sup> Sutton, para. 21.720-21.960.

<sup>57</sup> Sutton, para. 21.970-21.1005.

<sup>58</sup> Sutton, para. 21.1060-21.1160.

<sup>59</sup> Sutton, para. 21.1170-21.1340.

<sup>60</sup> Sutton, para. 21.1350-21.1360.

<sup>61</sup> Sutton, para. 21.1370-21.1380.

<sup>62</sup> Sutton, para. 21.1470-21.1580.

<sup>63</sup> See particularly Sutton, paras. 23.500-23.550.

<sup>64</sup> Sutton, para. 23.10-23.20.



against the insured. The relevant main contingency or the insured event for a third party liability insurance is characteristically a claim by a third party against the insured in a “claims made” policy. A claim by a third party against the insured, by itself, subject to the terms of the policy, is not, on the present state of the authorities, sufficient proof of the loss which the insured must establish. If the claim matures into a cause of action against the insured and the client or third party then obtains a remedy, the insured will then be treated by the courts as having a “legal liability” to the client or third party. In some policies, a reference to “claim” may signal an exception from the requirement that a “legal liability” is required. The sections of the liability insurance chapter consider the six elements for cover under a selection of third party liability insurances: the insured's activity or conduct causing the occurrence; the third party's loss; the cause of action and remedies against the insured; the third party's claim; and the insured's legal liability.

3. The material on professional indemnity insurance relies on and borrows from my earlier books on *Professional Indemnity Insurance Law*. It is also Anglicised and condensed for the indemnity insurance chapter in *Insurance Disputes*.<sup>65</sup>
4. The meaning of “claim” is now affected by the regulatory context.<sup>66</sup> This part explores the interconnections amount the ICA section 40 and 54, common law and market practice on claims made policies.<sup>67</sup>
5. The issues of misconduct and illegality present differently for liability insurance, and make for an instructive contrast with life insurance. The question of innocent third party rights in relation to recovery through the wrong-doer are the subject of some suggested resolutions here.<sup>68</sup>
6. This section sets out the main legal principles and market practices, in the context of modern common terms, involved in liability insurances with the following types in mind:
  - a) Public Liability.
  - b) Product Liability.
  - c) Professional Indemnity.
  - d) Directors' and Officers'.
  - e) Trustee Liability.
7. The six element analysis is applied to each.

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<sup>65</sup> *Professional Liability chapter, in Insurance Disputes, Fourth Edition, Routledge, with Graham Reid*

<sup>66</sup> *Sutton, para. 23.310.*

<sup>67</sup> *Sutton, para. 23.360-23.490.*

<sup>68</sup> *Sutton, para. 23.560-23.620.*

## Conclusion – Originality and Influence

1. Law Reform – Third Parties (Rights against Insurers) Act. I suggest that the indemnity principle idea has made a substantial contribution to legal thinking and law reform, most particularly in the reliance by the Law Commissions in their enquiry into the scope and operation of the *Third Parties (Rights Against Insurers) Act 1930*. I set out the detail in Annexure C1.
2. The *Code Review* took an entirely original approach, including to Code governance. For the first time, the proper role for self-regulation was analysed and laid out. The Code followed these approaches. The impact of the *Code Review* on the subsequent Code has been substantial. Peter Kell, the ASIC Deputy Chairman told the ICA Conference in February 2014 that my Code Review was: “arguably the most comprehensive since the Code was first introduced, which is reflected in the revised Code released earlier this month by the ICA.”<sup>69</sup> The work was applauded both by industry and by customer representatives and consumer advocates. The life insurance code was modeled on the ICA Code as shaped by my *Code Review*. The impact was such that AIDA asked me to deliver a paper and to speak at the Rome conference on the subject.
3. The Insurance Contracts Act 1984, amending legislation in 2013 was influenced on the amendments to section 29 by the issues set out in *Sutton*, paras. 21.780-21.840 and on cancellation by the issues set out in *Sutton*, paras. 21.1200-21.1330.
4. *Sutton* is widely cited by the courts, articles and policy-makers as authoritative – Annexure C3.

## Guide to Themes and Publications

Theme	<i>Code Issues Paper</i>	<i>Code Review Report</i>	<i>Sutton</i>	<i>Mansfield</i>	<i>TPD</i>
<b>1. History</b>	Sections 3-9	Sections 5-7	Paras. 3.20-3.80; 4.10-4.60; 4.180-4.330; 4.440-4.620; 21.470-21.1570.	Article	NA
<b>2. Regulation</b>	Sections 7-9, 10.3, 4, 7, 8 Appendix F	Sections 4, 6, 7, 9.3, 4, 6-11	Paras. 4.1040-4.1260; 21.470-21.620.	NA	NA
<b>3. Mental Illness &amp; Discrimination</b>	NA	Sections 11&12	Para. 21.110.	NA	NA
<b>4.&amp;5. Indemnity Principle Primary and</b>	NA	NA	Paras. 3.90-3.470; 3.910-3.920; 421.50; 23.10-23.20;	NA	NA

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<sup>69</sup> Annexure C2.

<b><i>Secondary Obligations</i></b>			23.90-23.110; 23.280-23.350; 23.500-23.540; 23.810-23.830.		
<b><i>6. Life</i></b>	NA	NA	Paras. 3.540-3.640; TPD: 21.270-21.440.	Pages 106-108	Article
<b><i>7. Liability</i></b>	NA	NA	Chapter 23	NA	NA

### **Guide to Influences**

<b>Theme</b>	<b><i>AIDA Discrimination Paper</i></b>	<b><i>AIDA Self Regulation Paper</i></b>	<b><i>Masel Lecture</i></b>	<b><i>FOS Life Manual</i></b>	<b><i>Insurance Disputes Chapter</i></b>	<b><i>ACFS MID Paper</i></b>
<b><i>1. History</i></b>	Yes	Yes	Yes	No	No	Yes
<b><i>2. Regulation</i></b>	Yes	Yes	Yes	Yes	No	Yes
<b><i>3. Mental Illness &amp; Discrimination</i></b>	Yes	No	No	Yes	No	Yes
<b><i>4.&amp;5. Indemnity Principle Primary and Secondary Obligations</i></b>	No	No	No	No	Yes	No
<b><i>6. Life</i></b>	Yes	No	Yes	Yes	No	Yes
<b><i>7. Liability</i></b>	NO	No	Yes	No	Yes	No

### **Annexure A - Career Details**

### **Annexure B – Outline Summary of Sutton Themes**

### **Annexure C – Originality and Influences**